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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1419

DANIEL A. O'BRIEN, Superintendent of Correctional Institution at Warwick, Massachusetts
PETITIONER

v.

ANTHONY G. SAVILLE
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ROBERT H. QUINN,
Attorney General
JOHN J. IRWIN, JR.,
Assistant Attorney General
Chief, Criminal Division
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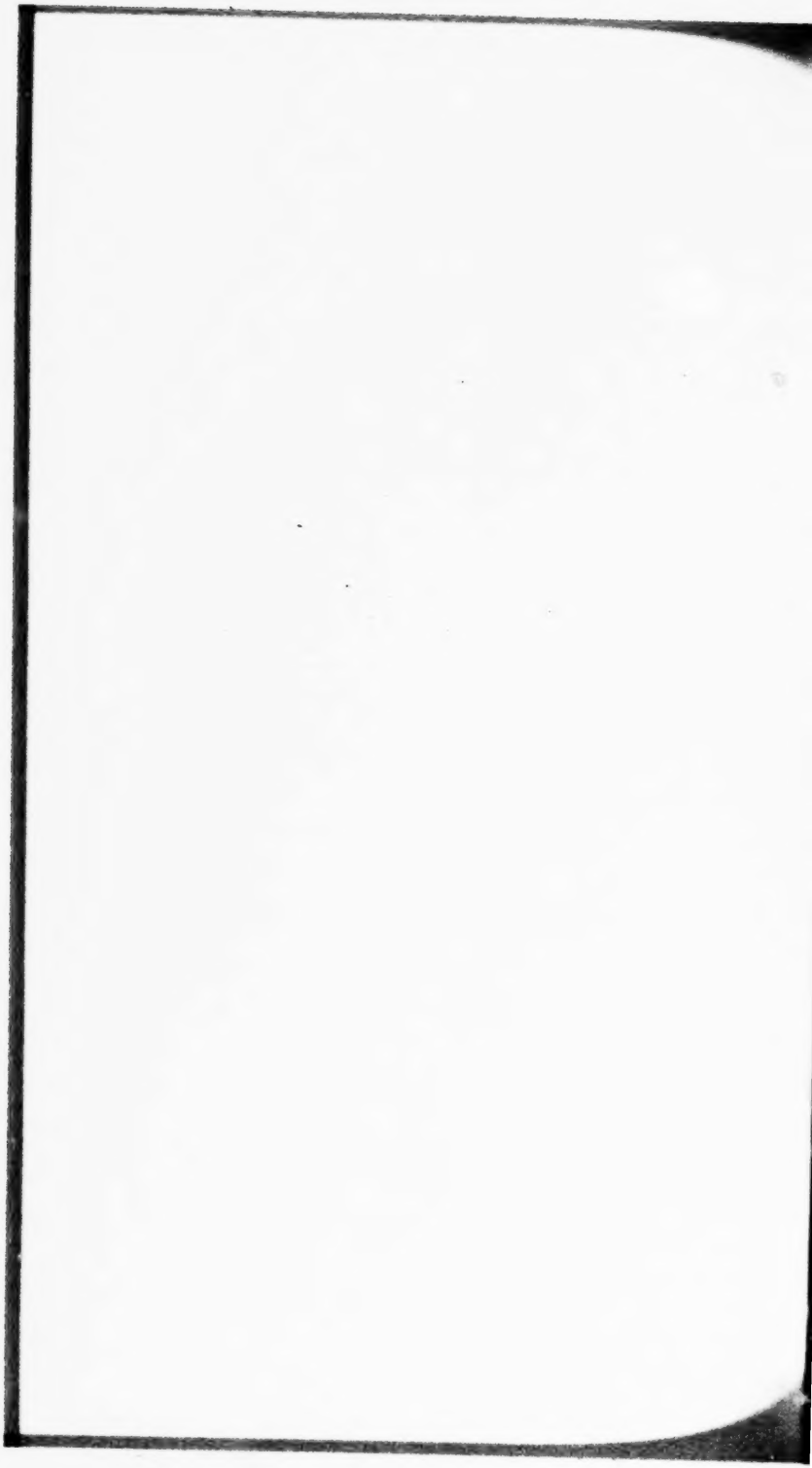

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No.

DANIEL A. O'BRIEN, Superintendent of
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PETITIONER

v.

ANTHONY G. SAVILLE
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Opinions Below

The opinions of the court below (App. B and C) are not yet reported. The opinion of the district court (App. A) is not reported.

Jurisdiction

The judgment of the court below was entered on December 17, 1969. A timely petition for rehearing was denied on January 13, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question Presented

Whether the court below erred in holding an affidavit in support of an application for a search warrant legally insufficient.

Statement

Respondent was convicted in the Hampden County Superior Court on two indictments charging him with possession of counterfeit bills and counterfeiting equipment in violation of Mass. Gen. Laws, ch. 267, Sections 9 and 13 respectively. On direct appeal, the Massachusetts Supreme Judicial Court unanimously affirmed the conviction as against respondent's challenge to the validity of a search. *Commonwealth* v. *Saville*, 353 Mass. 458, 233 N.E.2d 9 (1968). Respondent then applied for a writ of habeas corpus in the United States District Court for the District of Massachusetts, challenging, *inter alia*, the validity of the search. After an evidentiary hearing, the district court denied the petition for a writ of habeas corpus (App. A). On appeal, the court below vacated the judgment of the district court and ordered that respondent be discharged from custody.

1. The relevant evidence bearing on the search (the sufficiency of which petitioner did not challenge in the district court) is set forth in the opinion of the Massachusetts Supreme Judicial Court. It showed that on July 4, 1966, warrants were applied for by one Sergeant Desrosiers of the West Springfield Police to search the apartment and place of employment of one John P. Parisi, and respondent's print shop. In support of the application, three affidavits were filed before the Clerk of the Springfield District Court, which provided in pertinent part:

> I have information based upon * * * statements made to me by Detective Richard Hurley of the Connecticut

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State Police, Westbrook Barracks that on July 3, 1966 one John P. Parisi of 38 Burford Avenue, West Springfield, was arrested in Old Lyme, Connecticut, on ten counts of uttering counterfeit ten dollar bills and that at the time of his arrest said Parisi had in his possession four counterfeit ten dollar bills * * *. The said Parisi has a prior record for uttering forged checks in this Commonwealth * * *

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, authorizing the search of * * * the premises at #168 New Bridge Street in the Town of West Springfield being a garage occupied by Hertz Rentals and being a place of employment of John Parisi.

I have information based upon * * * statements made to me by Detective Richard Hurley of the Connecticut State Police, Westbrook Barracks that on July 3, 1966 one John P. Parisi of 38 Burford Avenue, West Springfield, was arrested in Old Lyme, Connecticut, on ten counts of uttering counterfeit ten dollar bills and that at the time of his arrest said Parisi had in his possession four counterfeit ten dollar bills * * *. The said Parisi has a prior record for uttering forged checks in this Commonwealth * * *

WHEREFORE, I respectfully request that the court issue a warrant and order for seizure, authorizing the search of * * * the first floor tenement at #38 Burford Avenue in the Town of West Springfield occupied by one John P. Parisi and the space in the attic and in the cellar appurtenant to said tenement.

I have information based upon ** * * statements made to me by Detective Richard Hurley of the Connecticut State Police that John J. Parisi has stated that Anthony Saville of 38 Burford Avenue, West Springfield gave said Parisi 150 counterfeir (sic) ten

> dollar bills, this occurring at the print shop of said Saville located at 212 Bosworhh (sic) Street in West Springfield yesterday afternoon * * *
>
> WHEREFORE, I respectfully request that the court issue a warrant and order the seizure, authorizing the search of * * * the building and premises at 212 Bosworth Street in the Town of West Springfield.

On the basis of these affidavits, a warrant issued for the search of respondent's print shop at 212 Bosworth Street. A search of the premises revealed counterfeiting equipment which was subsequently introduced as evidence at trial.

2. The Massachusetts Supreme Judicial Court, in affirming the conviction, ruled, *inter alia,* that the three affidavits, all submitted to the same issuing magistrate on the same day, could properly be read together in order to make a determination as to whether probable cause existed for the issuance of the last warrant authorizing the search of respondent's print shop. On oral argument before the court below, respondent conceded that they could be so read together. See *United States* v. *Serao,* 367 F.2d 347, 348-350 (C.A. 2), vacated on other grounds, 390 U.S. 202; *United States* v. *Markis,* 352 F.2d 860 (C.A. 2), vacated on other grounds, 387 U.S. 425.

In ruling that the affidavits, considered together, were legally insufficient to establish the existence of probable cause to search the respondent's print shop, the court below did not question the reliability of Detective Hurley of the Connecticut State Police, or of Parisi; nor did the court rule that the underlying facts were not sufficiently detailed in the supporting affidavits. Simply, the court ruled (App. C)

> The affidavit in this case fails to satisfy the requirements of Aguilar (footnote omitted). It said only that

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Detective Hurley had told Desrosiers that Parisi "had stated" that Saville gave him the counterfeit money at his print shop. Thus, Hurley may have received a call from someone who claimed to have overheard the remark at a neighborhood bar, see *Spinelli* v. *United States*, 393 U.S. 410, 417 (1969); a cellmate of Parisi's could have furnished the information to the police; or the hearsay chain could have comprised only police officers. The affidavit simply did not reveal when or to whom the statement had been made.

On a petition for rehearing, respondent pointed out that nothing in the supporting affidavits even remotely hinted that Parisi "had stated" the information other than directly to Detective Hurley or, at the very least, to investigating Connecticut police officers during an obviously ongoing investigation. The court below rejected this argument, holding that if Parisi and Detective Hurley were the only persons comprising the hearsay chain, then the affidavit was nevertheless insufficient for failing to state the fact (App. D).

Reasons For Granting The Writ

In our view, the decision of the court below ruling that an affidavit must not only allege facts showing the reliability of the informer, but must also affirmatively allege facts which negate the speculative inference[1] that other persons comprised the hearsay chain, goes further than ruling of this court, and should be appropriately corrected.

---

[1]The court below, in denying the petition for a rehearing, unequivocally stated that it did not rely on information *dehors* the affidavits. In light of this statement, it seems that the court below thought that other persons might have comprised the hearsay chain because of the use of the phrase, "had stated", in the last affidavit.

In the present case, it was clearly reasonable for the issuing magistrate to have concluded that Parisi "had stated" the incriminating information directly to Detective Hurley who, in turn, relayed the information to Officer Desrosiers, the applicant. Reading the three affidavits together, the issuing magistrate had reason to know that Parisi had been arrested just the day before by Connecticut authorities for passing bogus bills, and that an investigation was then in progress. Within the total picture as described to the magistrate by the accompanying affidavits, there was hardly time for Parisi to have frequented a neighborhood tavern, as suggested by the court below, or for the Connecticut police officers to have planted a cellmate to secure the relevant information from Parisi — also suggested by the court below.[2] An issuing magistrate — in order to be neutral and detached from the regular law enforcement role — must act upon information before him — nothing more, nothing less. Just as he cannot draw upon unreasonable inferences in order to find the existence of probable cause, it seems to us, so he should not be required to be defense oriented and to draw upon unreasonable inferences which might negate the existence of probable cause. Nothing in the accompanying affidavits even remotely hinted that the informant, Parisi, had volunteered the information in a tavern or a cell.[3] All the information before the magis-

[2]The third possibility suggested by the court below— i.e., that Parisi "had stated" his information to investigating officers in Connecticut— is obviously the most reasonable of the three suggested by the court below. That these fellows officers were not specified in the affidavits does not vitiate the otherwise proper affidavits. See *United States* v. *Ventresca*, 380 U.S. 102, 111; *Smith* v. *United States*, 358 F.2d 833, 835 (C.A.D.C.), certiorari denied, 386 U.S. 1008.

[3]The possibility that Parisi had related the information in a tavern apparently was taken from *Spinelli* v. *United States*, 393 U.S. 410, 417. The possibility that he had confessed to a cellmate was suggested— without any factual basis— by respondent in his brief in the court below.

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trate pointed to the inescapable conclusion that Parisi, caught in the act, placed the blame where it was due to investigating Connecticut officers.

In short, under the ruling of the court below, police officers are now required to do more than relate the relevant information; they are required to prepare legallistic ironclad affidavits which do not even permit of speculative inferences negating the existence of probable cause. Neither the Fourth Amendment, nor the right of privacy which that Amendment properly recognizes and protects, demands that this burden be placed upon police officers charged to enforce the law under varying and trying circumstances.

Conclusion

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT H. QUINN,
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JOHN J. IRWIN, JR.,
Assistant Attorney General
Chief, Criminal Division
RUTH I. ABRAMS,
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District Attorney
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LEONARD E. GIBBONS
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APPENDIX A

Anthony G. SAVILLE. Petitioner,
v.
Palmer C. SCAFATI, Superintendent, Massachusetts Correctional Institution, Walpole, Respondent.

Misc. Civ. No. 68-28-C.

United States District Court
D. Massachusetts.

March 28, 1969.

OPINION

CAFFREY, District Judge.

This is a civil action which came on for trial on the basis of an amended petition for a writ of habeas corpus and on respondent's motion to dismiss. Petitioner is presently an inmate of a Massachusetts correctional institution.

The amended petition premises petitioner's claim for relief on three separate grounds.

Ground One consists of an allegation that at petitioner's trial in Superior Court of Massachusetts for the County of Hampden "the critical evidence presented by the prosecution had been obtained by means of an unconstitutional search of petitioner's printing shop." Briefly stated, petioner's contention with regard to Ground One is that the affidavit on the basis of which a warrant for the search of the premises was issued does not state facts justifying the issuance of said warrant. This contention was made by petitioner to the Massachusetts Supreme Judicial Court which in an opinion, Commonwealth v. Saville, 1968 Mass. Adv. Sh., p. 29, 233 N.E. 2d 9, ruled adversely to petitioner.

Ground Two consists of an allegation that petitioner's

convictions were based on evidence tending to indicate his possession of federal reserve notes and equipment capable of being used to counterfeit federal reserve notes, and an allegation that this evidence is inadequate as a basis for conviction of a violation of Mass. G.L., ch. 267, sec. 9. This contention was also made by petitioner to the Supreme Judicial Court and ruled upon adversely to petitioner in Commonwealth v. Saville, *supra*.

Ground Three is a contention that, if correctly construed by the Supreme Judicial Court in Commonwealth v. Saville, *supra*, ch. 267, sec. 9 and sec. 13, of Mass. G.L., are preempted by 18 U.S.C.A. §§ 471-492 and by the United States Constitution. It is expressly conceded, with regard to Ground Three, that petitioner's then counsel did not press this issue on his appeal to the Supreme Judicial Court.

An evidentiary hearing was held in this court, at which testimonial evidence was offered only with reference to Ground One. The witnesses who testified with regard to the circumstances surrounding both the execution of the affidavit in support of the search warrant and the issuance of the search warrant under attack were Sergeant Louis P. Desrosiers, of the Springfield Police Department, and Edward P. Collins, Esq., Clerk of the Springfield District Court, who issued the search warrant. Documentary evidence also was admitted with regard to Ground One, consisting of a photostatic copy of the application for the search warrant in question as well as the affidavit filed in support of two other search warrants issued the same day by Mr. Collins. The transcript of a hearing held January 12, 1967 in Hampden Superior Court on a motion to suppress, and the transcript of the trial held in that court on January 30 and 31 and February 1 and 2, 1967, were filed as exhibits in support of all three grounds. Also filed as exhibits were a motion for new trial filed in Superior Court on Sep-

tember 26, 1967 and a "Summary of Record" filed with the Supreme Judicial Court.

I am satisfied that nothing adduced at the evidentiary hearing in this court adds to or changes the facts recited in the opinion of the Supreme Judicial Court in Commonwealth v. Saville, *supra*. Nor am I persuaded that there is any legal merit to petitioner's contentions with regard to an illegal search and seizure. In United States v. Ventresca, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965), the Supreme Court stated (p. 108, p. 746 of 85 S. Ct.):

> "Affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. • • • Technical requirements of elaborate specificity once exacted under common law pleadings have no place in this area."

In ruling that "all the affidavits presented to the clerk on July 4, 1966 adequately revealed the facts relied upon to show probable cause," the Supreme Judicial Court did exactly what was directed in *Ventresca, supra*. Accord: United States v. Serao, 367 F. 2d 347, 348 (2nd Cir. 1966), vacated on other grounds 390 U.S. 202, 88 S. Ct. 899, 19 L. Ed. 2d 1034 (1968).

With reference to Ground Two, the construction of Mass. G.L., ch. 267, secs. 9 and 13, is a matter for the determination of the Supreme Judicial Court as the final arbiter of the meaning of any and all statutes of the Commonwealth of Massachusetts. Ferguson 1. Manning, 216 F. 2d 188 (4th Cir. 1954); Kleczka v. Commonwealth of Massachusetts, 259 F.Supp. 462, 466 (D.Mass. 1966).

Ground Three was expressly disclaimed at oral argument before the Supreme Judicial Court, and that court's brief reference thereto by way of a dictum footnote to its opinion does not establish the claimed futility of now presenting that issue to the state courts. Therefore, that issue is not properly before this court.

At the conclusion of the evidentiary hearing, in response to a question from this court as to whether there were any other matters he wished to call to the court's attention, petitioner orally attacked the competency of his state court counsel. This, and several other points sought to be raised in his amended petition for habeas corpus, such as paragraphs 5(c) and 5(d) thereof, as well as certain additional points sought to be raised in his memorandum of law, e.g., the contention that the informant Parisi was drunk, are not properly before this court because they have not previously been presented to the courts of the Commonwealth of Massachusetts. Needel v. Scafati, 1st Cir., March 20, 1969,—F. 2d—.

With specific reference to the three examples given even if they were before this court the evidentiary hearing here establishes that there is no merit to them. For example, I am persuaded that although he had no prior convictions for counterfeiting Parisi did have a record, known to Officer Desrosiers, of counterfeiting activity and counterfeiting arrests, and that consequently the statement that Parisi had a record for counterfeiting was not untrue as alleged in paragraph 5(c) of the amended petition, taking the words used in their ordinary meaning. Likewise, the contention raised in 5(d), for example, that a clerk of court does not have standing to issue a search warrant, is totally without merit when it is remembered that a United States Commissioner is authorized to issue search warrants, that his authority to do so has been expressly upheld by the Supreme Court of the United States, directly in Go-Bart Importing Co. v. United States, 282 U.S. 344, 353, n. 2, 51 S.Ct. 153, 75 L.Ed. 374, and indirectly in many cases in which it has held legal searches and seizures made on the basis of search warrants issued by United States Commissioners. E.g., United States v. Ventresca, *supra*. It should be noted that a United States Commissioner is not required

to be a lawyer or a member of the bar or to have any specific qualifications other than an appointment from the district court of the district in which he is serving as a Commissioner. 28 U.S.C.A. § 631. Petitioner advances no valid reason why the Commonwealth must meet a higher standard than the United States with regard to the qualifications of those authorized to issue search warrants.

In the instant case, Mr. Collins, the clerk of court, testified that he is a member of the bar, that he has been clerk of court since 1939, and that he actively practiced law until 1950 when a change in state law precluded clerks of court from practicing.

I rule, on the basis of the record before me, with regard to those issues properly before this court, that the merits of the factual dispute between the petitioner and the Commonwealth of Massachusetts were resolved in the hearing before the state courts, that the factual determination by the state courts is fairly supported by the record before the state courts and by the record before this court, that the fact-finding procedure employed by the state courts was adequate to afford petitioner a full and fair hearing, that the material facts of this case were adequately developed at the state court hearing, that the interpretation of the statutes of he Commonwealth is a matter for the Supreme Judicial Court and not properly raisable in this court by way of habeas corpus, Fountaine v. Crouse, 377 F.2d 378 (10th Cir. 1964), and that the remaining matters alleged in the petition are insufficient to form a basis for relief herein because they have not previously been submitted to the state courts for determination. Needel v. Scafati, *supra*.

Respondent's motion to dismiss is allowed.

Order accordingly.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 7372.

ANTHONY G. SAVILLE,
PETITIONER, APPELLANT,
v.
DANIEL A. O'BRIEN, Superintendent of Massachusetts Correctional Institution at Warwick, Massachusetts,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*, WOODBURY* *Senior Circuit Judge*, and MCENTEE, *Circuit Judge*.

John G. S. Flym for appellant.
Lawrence P. Cohen, Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, *John Wall*, Assistant Attorney General, Chief, Criminal Division, *Edward W. Hanley III*, Assistant Attorney General, *Matthew J. Ryan, Jr.*, District Attorney, Western District, and *Leonard E. Gibbons*, Assistant District Attorney, were on brief, for appellee.

December 17, 1969.

MCENTEE, *Circuit Judge*. Petitioner, Anthony G. Saville, a state prisoner, was convicted in the Superior Court of Massachusetts on two indictments charging him with possession of counterfeit bank bills and possession of counterfeiting equipment in violation of M. G. L. (Ter. ed.) ch. 267, §§ 9, 13. On appeal, the Supreme Judicial Court upheld the convictions, affirming the trial court's denial of

* By designation.

petitioner's motion to suppress evidence obtained by a search made under a warrant allegedly issued without probable cause.[1] Petitioner then sought a writ of habeas corpus. After an evidentiary hearing, the district court denied the writ. On Saville's request for a certificate of probable cause we agreed to hear his appeal but only on the question of whether there was probable cause for the issuance of the search warrant.

The warrant in question, issued on July 4, 1966, by one Collins, clerk of the Springfield district court, was based on the affidavit of Sergeant Desrosiers of the West Springfield Police. The affidavit, which was typed by Collins from what Desrosiers told him, reads as follows:

> "I have information based upon . . . statements made to me by Detective Richard Hurley of the Connecticut State Police that John J. Parisi has stated that Anthony Saville of 38 Burford Avenue West Springfield gave said Parisi 150 counterfeir (sic) ten dollar bills, this occurring at the print shop of said Saville located at 212 Bosworth Street in West Springfield yesterday afternoon."

Two other affidavits, submitted by Desrosiers to the same court clerk earlier the same day in support of applications for warrants to search Parisi's home and place of employment, revealed that he had been arrested in Connecticut the previous day on charges of uttering counterfeit money and that when arrested he had in his possession forty bogus ten dollar bills.[2]

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[1] *Commonwealth* v. *Saville*, 353 Mass. 458, 233 N.E.2d 9 (1968).

[2] These two affidavits read, in part, as follows: "I have information based upon . . . statements made to me by Detective Richard Hurley of the Connecticut State Police, Westbrook Barracks that on July 3, 1966 one John P. Parisi of 38 Burford Avenue, West Springfield, was arrested in Old Lyme, Connecticut, on ten counts of uttering counterfeit ten dollar bills and that at the time of his arrest the said Parisi had in his possession forty counterfeit ten dollar bills all bearing serial #A-13705685-D. The said Parisi has a prior record for uttering forged checks in this Commonwealth."

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On the basis of the information contained in the three affidavits,[3] the clerk issued a warrant to search petitioner's print shop and evidence obtained in the search was introduced against him at trial.[4]

In *Jones* v. *United States*, 362 U.S. 257, 269 (1960), the Supreme Court held that hearsay may be the basis for the issuance of a search warrant "so long as [there is] a substantial basis for crediting the hearsay." This holding was amplified in *Aguilar* v. *Texas*, 378 U.S. 108 (1964). There the Court stated that where an affidavit is based on hearsay, the magistrate must be informed of some of the underlying circumstances from which the officer concluded that the informant was credible and his information reliable. The rule is the same whether the identity of the informant is disclosed or not. The sound policy behind this rule is to insure that a neutral officer is afforded the opportunity to exercise his independent judgment as to whether certain information in the hands of the police is sufficient to justify an invasion of privacy.

The affidavit in this case fails to satisfy the requirements of *Aguilar*.[5] It said only that Detective Hurley had told Desrosiers that Parisi "had stated" that Saville gave him the counterfeit money at his print shop. Thus, Hurley may have received a call from someone who claimed to have overheard the remark at the neighborhood bar, *see Spinelli* v. *United States*, 393 U.S. 410, 417 (1969); a cellmate of Parisi's could have furnished the informa-

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[3] During oral argument counsel for petitioner conceded that the court could consider all three affidavits on the theory that they added nothing to the Commonwealth's case.

[4] Among the articles seized were a photostat copying machine; sheets of stock paper; a negative of the reverse side of a $10 bill; two pieces of cloth with printer's ink on them; three pieces of burnt paper stock, and other articles containing printer's ink. No counterfeit money was found.

[5] Where a magistrate has only the affidavits before him, the warrant must be judged on their contents. *Aguilar* v. *Texas*, supra at 109 n. 1.

tion to the police; or the hearsay chain could have comprised only police officers. The affidavit simply did not reveal when or to whom the statement had been made.

As we have indicated, a basic policy of the Fourth Amendment is that the judgment of an independent magistrate should be interposed between the police and a suspect before an invasion of privacy is countenanced. *See, e.g., Johnson* v. *United States,* 333 U.S. 10, 14 (1948). The affidavit in the case at bar prevents the making of such a judgment by providing insufficient information for the purpose. Accordingly, we hold that the affidavit was insufficient on its face.

The danger presented by such a document is not hypothetical. Although we base this decision solely on the insufficiency of the warrant, we note that the evidentiary hearing below revealed that Detective Hurley had come by his information not from Parisi, but from an undisclosed third party, and that Desrosiers had obtained his information at least in part from the same unidentified informant. Moreover, since Desrosiers did not know to whom Parisi had spoken, nor through how many persons his information had passed before reaching Hurley, even Desrosiers could not have known whether the information was reliable or the informant credible.

This decision is consistent with *Spinelli.* There the Supreme Court was faced with an affidavit which stated, among other things, that the F.B.I. had been informed by a confidential, reliable informant that Spinelli was accepting wagers. In rejecting this statement as insufficient under *Aguilar's* dual standard, the Court observed that there was no indication how the informant came by this information. The affidavit did not say that he had personal knowledge nor, assuming that he had obtained the information indirectly, why his source was reliable. "It is clear," the Court concluded, "that a Commissioner could

not credit it without abdicating his constitutional function." *Spinelli, supra* at 416.

Nor is it significant that one of the informants in the hearsay chain is named in the affidavit:

> "Irrespective of the informant's reliability, he in turn may have received his information from someone wholly unreliable. Consequently, the fact that the agent vouched for the credibility or reliability of the informant cannot reach the crucial question posed by the hearsay on hearsay situation, present in this case. For the reliability of both the anonymous hearsay source and the information he imparted to the informant is totally lacking." *Roth* v. *United States,* 391 F.2d 507, 510-11 (7th Cir. 1967).

Informant Hurley's source was in fact totally unreliable, because it was totally unknown.

United States v. *Ventresca,* 380 U.S. 102 (1965), does not require a different result. In that case the Court defined the standard by which a reviewing court should interpret affidavits which are made in support of warrants. It held that,

> "where [the] circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common-sense, manner." *Ventresca, supra* at 109.

In that case a search warrant was obtained based on the affiant's belief that an illegal distillery was being operated in defendant's home. His information came both from personal observations and "information received from other Investigators . . . assigned to this investigation." In upholding the validity of the affidavit, the Court held that it could not conclude that the whole warrant was

based on hearsay because the affiant swore to at least partial personal observation. As to the information not based on personal observation, the Court observed that, read as a whole, the detailed observations recounted in the affidavit could not be fairly regarded as having come from other than official sources, and that observations made by fellow officers engaged in a common investigation are reliable.

The affidavit in the instant case is readily distinguishable for there is no claim that the affiant had personal knowledge and there is no indication that the information he imparted to the clerk came from official, viz., reliable, sources. Although Parisi, the imputed source of the information, was known, for reasons already stated the authenticity of the statement attributed to him could not be verified. To read this affidavit as anything but an open ended document giving no clue to the actual source of Detective Hurley's information, would go far beyond a "commonsense interpretation." As we said in *Rosencranz* v. *United States,* 356 F.2d 310, 317 (1st Cir. 1966):

> "It is one thing to expect the magistrate to give a commonsense reading to facts set forth and to draw inferences from them. It is quite another thing to expect the magistrate to reach for external facts and to build inference upon inference in order to create a reasonable basis for his belief that a crime is presently being committed."

We next consider the question of whether the error was harmless. *Chapman* v. *California,* 386 U.S. 18 (1967). The standard that must be applied is whether it was harmless beyond a reasonable doubt. *Chapman, supra* at 24. With regard to the search there was extensive testimony by two policemen and two experts. A state trooper described how he, in the company of three other policemen, searched the Saville premises and found a photographic negative of a ten dollar bill in a rubbish barrel behind the

print shop. Desrosiers testified as to how he assisted in finding the negative, and also described in detail all the equipment that had been removed from the print shop in execution of the warrant. One expert witness testified that a lithograph machine produced by his company and owned by petitioner was capable of producing counterfeit money. He also gave his opinion regarding the photographic process that would have to be used to produce counterfeit money, stated that a vacuum frame could be used to make a counterfeit plate, and identified one of the Commonwealth's exhibits as a vacuum frame. The other expert was a special agent of the United States Secret Service who testified concerning the photographic negative seized at the shop, and stated that the bills in evidence, seized from Parisi, were counterfeit. By the *Chapman* standard, it cannot be gainsaid that the error complained of did contribute to petitioner's conviction on the charge of possessing counterfeiting equipment.

But petitioner was also convicted on the more serious charge of "unlawful possession of bank bills with intent to utter." If his conviction on this count was not infected by the constitutional error, petitioner has not been prejudiced and cannot gain his freedom. Applying the *Chapman* test, however, we think that petitioner's conviction on this charge cannot stand either. The state's case against him rested on Parisi's testimony. But we are not willing to speculate that the accumulated testimony describing the search, and the evidence seized in its wake, did not influence the jury's determination of guilt on this charge also. Our decision, of course, does not prevent the state from retrying the petitioner, within a reasonable time, without relying on the tainted evidence.

Judgment will be entered vacating the judgment of the district court and remanding the case to that court for further proceedings consistent with this opinion.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 7372.

ANTHONY G. SAVILLE,
PETITIONER, APPELLANT,
v.
DANIEL A. O'BRIEN, Superintendent of Massachusetts Correctional Institution at Warwick, Massachusetts,
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

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ON PETITION FOR REHEARING

January 13, 1970.

PER CURIAM. Appellee's petition for rehearing, in addition to taking the inexcusable liberty of stating, three times, that we decided the case on a ground that we specifically said we did not, exhibits a misconception that we

* By designation.

think calls for a substantive reply. Appellee concedes that there was a "possibility" that the essential affidavit was based on hearsay, but says that the magistrate was warranted in concluding otherwise, and that it was "hypertechnical" and "speculative" for us to say he could not. What appellee forgets is that the issuance of a warrant requires a showing of probable cause. This means that the moving party has a burden of proof. If an affidavit is blind as to whether it is based on hearsay or not, that burden is not met. Any other rule would permit the party seeking a warrant, and having only hearsay, to leave the affidavit blind, and hope for the best. It is not to be forgotten that if the information is reliable, or based upon other than hearsay, it is very easy for the party who is seeking the warrant, and who has complete control over what he chooses to produce, to say so.

The petition for rehearing is denied.